Supreme Court, U.S.
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No. 97-1570

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Public Law 86-272 (15 U.S.C. § 381), in which Congress established a threshold level of contacts necessary for states to tax certain transactions in interstate commerce, is consistent with Congress's power to regulate interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner (defendant below) is the Commissioner of Revenue of the Commonwealth of Massachusetts ("Commissioner").

Respondent (plaintiff below) is the National Private Truck Council, Inc. ("NPTC"), a national trade association incorporated under the laws of the Commonwealth of Virginia. NPTC has no parent corporations or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

In this case, NPTC successfully challenged a Massachusetts regulation under which Massachusetts had sought to tax income of non-Massachusetts companies derived from certain transactions in interstate commerce. The trial court held, and the Supreme Judicial Court of Massachusetts affirmed, that the Massachusetts regulation conflicted with, and thus was preempted by, Pub. L. 86-272 (15 U.S.C. § 381). The Commissioner does not seek review of that holding. The courts below also rejected the Commissioner's counterargument that the federal law itself is unconstitutional; the courts held that the statute is valid pursuant to Congress' authority under the Commerce

Clause,[1] and thus is consistent with the Tenth Amendment.[2] It is the constitutional holding alone that is the subject of the Commissioner's petition to this Court. NPTC submits that there is no need for this Court to review the constitutionality of Pub. L. 86-272, and the petition therefore should be denied.

The relevant and material facts were stipulated or undisputed, were properly set out by the court below, and are unchallenged here. NPTC is a national trade association of more than 1,000 companies that manufacture and distribute products and transport their products in their own trucks—that is, trucks that the NPTC member either owns or leases. Pet. A-2.[3] Some NPTC members, not incorporated or based in Massachusetts, regularly solicit sales of tangible goods in Massachusetts. These orders are sent outside Massachusetts for approval, and once approved, the orders are filled from a store of goods outside Massachusetts and the goods are transported from outside Massachusetts to the customer in Massachusetts by the NPTC member using its own trucks. *Id.*

Public Law 86-272, enacted by Congress in 1959, prohibits a state from taxing the income that an out-of-state company earns from the sale of tangible goods in the state if the only contacts with the taxing state "by or on behalf of" the company include "the solicitation of orders

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[1] "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . ." U.S. Const., Art. I, § 8.

[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

[3] The decisions below of the trial court and the Supreme Judicial Court of Massachusetts are set forth in an appendix to the Commissioner's petition for certiorari. Citations to those decisions in this brief will be to the relevant page of that appendix, as follows: "Pet. A——". Other citations to the Commissioner's petition will be to the relevant page as follows: "Pet. ——".

. . . in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." 15 U.S.C. § 381.

The Massachusetts regulation challenged by NPTC interpreted and applied Pub. L. 86-272, but in doing so, added a qualification not found in the federal statute: it interpreted Pub. L. 86-272's "shipment or delivery from a point outside the State" to mean "shipment or delivery *by common carrier or contract carrier* from a point outside Massachusetts." 830 Code Mass. Regs. 63.39.1(5)(a) (emphasis added). The regulation thus imposed the Massachusetts tax on companies, like NPTC's members, that solicit sales of tangible goods in Massachusetts and, following approval of those sales outside Massachusetts, deliver the ordered goods into Massachusetts from outside the state in their own trucks.[4]

NPTC filed suit, claiming that the Massachusetts regulation violated Pub. L. 86-272 by limiting the statute's protection to transactions only involving shipment by common or contract carrier, and not delivery by the company itself in its own trucks. The Commissioner argued that the Massachusetts regulation was consistent with Pub. L. 86-272, and that in any event, Pub. L. 86-272 is unconstitutional under the Commerce Clause and the Tenth Amendment.

The case was decided on cross-motions for summary judgment, upon agreed facts. Pet. A-2. The trial court granted summary judgment in favor of NPTC. The court declared that the Massachusetts regulation violates Pub. L. 86-272 "by reducing the scope of tax immunity the federal

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[4] Transportation of a company's goods by the company itself is known as "private carriage"; private carriage, by definition, is not for-hire. "Common carriage" and "contract carriage" are two types of for-hire transportation; in common and contract carriage, the shipper and the carrier are different entities. Pet. A-2 n.1.

statute affords," and therefore is preempted by the federal statute to the extent the regulation applied to foreign corporations whose only contacts with Massachusetts are the solicitation of sales of tangible goods and the delivery of such ordered goods into Massachusetts from a point outside the state in the company's own trucks. Pet. A-25. The court also declared that Pub. L. 86-272 is constitutional. Pet. A-26.

On direct appellate review, the Supreme Judicial Court of Massachusetts affirmed. Pet. A-2. On the central issue of the Massachusetts regulation's validity under Pub. L. 86-272, the court held that the federal law protects delivery by an out-of-state company in its own trucks, and that the Massachusetts regulation, which failed to recognize that protection, was preempted. Pet. A-4 to A-6. Additionally, the court firmly rejected the Commissioner's claim that Pub. L. 86-272 is unconstitutional. The court held that "Congress enacted [Pub. L. 86-272] pursuant to its power to regulate interstate commerce." Pet. A-7. The statute "sets a uniform minimum standard which must be met before a State may tax interstate commerce. . . . This is clearly within the ambit of Congress's commerce power." Pet. A-8. The court concurrently rejected the Commissioner's Tenth Amendment claim, noting this Court's instruction that "[w]here Congress acts within an enumerated power, such as its authority under the Commerce Clause, the Tenth Amendment is not implicated." Pet. A-7.

In petitioning this Court for a writ of certiorari, the Commissioner expressly has conceded the primary issue in this case, *i.e.*, the invalidity of the Massachusetts regulation under Pub. L. 86-272. He concedes that the decision below, holding that delivery by private carriage is protected under Pub. L. 86-272, is consistent with a decision handed down by the Supreme Court of Virginia in an identical case decided last year. Pet. 9, n.1 (citing *Commonwealth of Virginia, Dept. of Taxation v. National*

Private Truck Council, Inc., 480 S.E.2d 500 (Va. 1997)). The Commissioner, therefore, seeks certiorari only on his secondary claim, also rejected below, that Pub. L. 86-272 itself is unconstitutional. *Id.* For the reasons that follow, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO CONFLICT FOR THIS COURT TO RESOLVE. COURTS BELOW UNANIMOUSLY HAVE CONCLUDED THAT PUB. L. 86-272 IS CONSTITUTIONAL.

The petition for certiorari should be denied because there is no dispute among any lower courts as to the constitutionality of Pub. L. 86-272. Shortly after enactment of Pub. L. 86-272, three state supreme courts heard challenges to the constitutionality of the statute on Commerce Clause grounds, and, in two of the cases, specifically on Tenth Amendment grounds as well.[5] These courts unanimously concluded that Pub. L. 86-272 is constitutional. The decision of the Supreme Judicial Court of Massachusetts in this case is fully in accord with these long-established cases. All courts that have considered the question, including the court below in this case, agree that Pub. L. 86-272 is a valid exercise of Congress's Commerce Clause power, and that, consequently, the statute does not violate the Tenth Amendment's reservation to the states of powers not delegated to the federal government. There is, therefore, no conflict of opinion requiring this Court's resolution.

In *State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n*, 382 S.W.2d 645 (Mo. 1964), the Supreme Court of Missouri considered claims that, among

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[5] The Commissioner's assertion, Pet. 13, that no courts have considered the constitutional claim made in this case, is utterly and demonstrably false. Indeed, the court below, in drawing on two of these earlier cases, expressly noted that those courts "reject[ed] the Tenth Amendment claim raised here." Pet. A-7.

other things, Pub. L. 86-272 exceeded Congress's authority under the Commerce Clause and violated the Tenth Amendment. *Id.* at 654. The court concluded that Pub. L. 86-272 "is in our view a regulation which Congress was authorized to make," and held that the statute was not unconstitutional "on any of the grounds presented." *Id.* at 657.

The same year, the Supreme Court of Louisiana also addressed these same issues in *International Shoe v. Cocreham*, 164 So.2d 314 (La.), *cert. denied*, 379 U.S. 902 (1964). There, the state claimed that Congress exceeded its Commerce Clause power in enacting Pub. L. 86-272, and that the statute "impinges upon the rights reserved to [the states] by the Tenth Amendment." *Id.* at 253. The court flatly rejected Louisiana's claim that Pub. L. 86-272 unconstitutionally impinged upon the state's taxing authority: "Congress, having the power to regulate commerce, has the primary right to consider and determine whether the burden of [Louisiana's] tax adversely affects interstate commerce and, if it finds that it does, to take such measures as it deems effective to suppress it." *Id.* at 262-63. The court thus held that Pub. L. 86-272 was a valid exercise of Congress's Commerce Clause authority and that, insofar as Louisiana's tax laws conflicted with it, the state laws must yield. *Id.* at 266.

In 1965, still another court, the Supreme Court of Oregon, reached the same conclusion. In *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375 (Or. 1965), the court stated that "Congress has the power, under the Commerce Clause, to remove or alleviate state-imposed burdens on interstate commerce," and that in enacting Pub. L. 86-272, "Congress has found it is wise, for the protection of certain business activities from the possible burdens of multistate taxation, to limit state taxation of interstate commerce." *Id.* at 378. The court held that Pub. L. 86-272 did not violate the Commerce Clause:

"Congress now has acted; its statute [Pub. L. 86-272] is contrary to the state [taxing] action; the federal statute is valid and the state statute must yield." *Id.* at 380.[6]

The decision of the Supreme Judicial Court of Massachusetts below fully comports with each of the foregoing cases. The Massachusetts court held that "Congress enacted [Pub. L. 86-272] pursuant to its power to regulate interstate commerce," and that the statute's uniform minimum standard which must be met before a state may tax interstate commerce, is "clearly within the ambit of Congress's commerce power." Pet. A-8. The court therefore rejected the Commissioner's Tenth Amendment claim, drawing on this Court's teaching that "[w]here Congress acts within its enumerated powers, such as its authority under the commerce clause, the Tenth Amendment is not implicated." Pet. A-7 (citing *New York v. United States*, 505 U.S. 144, 156 (1992)).

The decision below is simply the latest in an unbroken line of decisions recognizing the now long-established view that Pub. L. 86-272 is within Congress's authority under the Commerce Clause, and therefore does not infringe any right reserved to the states under the Tenth Amendment. It is unnecessary for this Court to grant certiorari to address this issue.

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[6] The Oregon court did not specifically discuss the Tenth Amendment, but the conclusion that Pub. L. 86-272 does not violate that amendment necessarily follows from the court's holding that enactment of Pub. L. 86-272 was within the power delegated to Congress under the Commerce Clause. As this Court recently has said, Commerce Clause and Tenth Amendment inquiries "are mirror images of each other," such that, if Congress acts within its authority under the Commerce Clause, the Tenth Amendment, which reserves to the states powers *not* delegated to the federal government, is not violated. *New York v. United States*, 505 U.S. 144, 156 (1992).

II. THIS CASE PRESENTS NO SUBSTANTIAL ISSUE WARRANTING THIS COURT'S REVIEW.

In addition to there being no conflict among lower court opinions requiring resolution by this Court, this case also presents no substantial issue warranting this Court's review. The Court's current Commerce Clause and Tenth Amendment jurisprudence makes clear that—as found by every court to address the matter—Pub. L. 86-272 is constitutional. Additionally, the issues confronting the Court in its recent Commerce Clause and Tenth Amendment cases are not present here, and, as the court below recognized, the scope of the statute in any event is modest.

A. Well-established Commerce Clause and Tenth Amendment principles already make clear that Pub. L. 86-272 is constitutional.

Principles already well-established by this Court and others plainly demonstrate that Pub. L. 86-272 is constitutional, and that the decision below, along with the decisions of the several other courts that have upheld the statute, is correct.

Since the early years of the Republic this Court has recognized Congress's plenary power to regulate interstate commerce. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

Moreover, it is well established that Congress, consistent with its power to regulate interstate commerce, can preempt entirely the states' regulation of private activity that affects interstate commerce. *See, e.g., Hodel v. Virginia Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) and cases cited therein. In particular, Congress can prohibit states from imposing taxes found by Congress to interfere with interstate commerce. *See, e.g., Arizona Public Serv. Co. v. Snead*, 441 U.S. 141 (1979). In

Snead, this Court upheld, under the Commerce Clause, a federal statute that invalidated a New Mexico state tax on the generation of electricity, which tax Congress had found interfered with interstate commerce. *Id.* at 150. The Court noted "the broad power of Congress to regulate interstate commerce," and held that Congress "had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference." *Id.*

With respect to the Tenth Amendment, in cases involving the division of authority between the federal and state governments, this Court has made clear that Commerce Clause and Tenth Amendment inquiries "are mirror images of each other." *New York v. United States*, 505 U.S. 144, 156 (1992). That is, if Congress acts within its authority under the Commerce Clause, the Tenth Amendment is not implicated. *See id.* Thus, "historically, Congressional prohibitions on state taxation have been upheld over Tenth Amendment challenges." *Deer Park Industrial School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998) (discussing cases).

Applying these principles, numerous courts have upheld against Tenth Amendment challenge other federal statutes limiting the states' taxing authority. Just this year, for example, the Fifth Circuit upheld the constitutionality of a federal statute that exempts from state and local ad valorem property taxes businesses located inside Foreign Trade Zones. *Deer Park Industrial School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095 (5th Cir. 1998). The court, citing this Court's opinion in *Todd Shipyards*, noted that "the plenary power granted to Congress under the Commerce Clause includes the power to protect interstate and foreign commerce from taxation," and held that Congress's enactment of the statute restricting state and local taxation was "well within its power under the Commerce Clause". *Deer Park*, 132 F.2d at 1099. The court also expressly rejected the school district's Tenth Amend-

ment claim because that amendment does not inhibit the activities of the federal government when the government acts in accordance with a power conferred on it by the Constitution. *Id.*

In *Southeastern Pennsylvania Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506 (E.D. Pa. 1993), *aff'd without op.*, 27 F.3d 558 (3d Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) *("SEPTA")*, the court upheld a federal statute prohibiting the states from taxing certain commuter rail lines, and rejected a claim that the statute violated the Tenth Amendment. The court held that

> the fact that pre-emptive federal legislation may impinge on a state revenue-raising scheme has no special Tenth Amendment implications. Congress' authority to prohibit state taxation as an incident of the exercise of its delegated powers is well-entrenched—dating back, one might argue, to *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819).

Id. at 1520.

Other cases in which courts have upheld, in the face of Tenth Amendment challenges, federal statutes restricting states' taxing power, include *New Jersey v. Consolidated Rail Corp.*, 690 F. Supp. 1061 (Sp. Ct. R.R.R.A. 1988) (rejecting Tenth Amendment challenge to federal statute prohibiting states from taxing Conrail), and *Arizona v. Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d 398 (9th Cir. 1981) (rejecting Tenth Amendment challenge to restriction on state taxation in the Railroad Revitalization and Regulatory Reform Act).

The Commissioner attempts to avoid the plain import of these well-established principles by distinguishing Pub. L. 86-272 from other federal statutes restricting state taxation. He argues that Congress's goal in enacting Pub. L. 86-272 was solely to prevent the states from unduly burdening interstate commerce, and that this "undue burden"

rationale is "a far weaker basis for a federal restriction on state taxation than discrimination against interstate commerce or a tax on federal instrumentalities or employees." Pet. 20.

But the Commissioner's unilateral demotion of considerations of "undue burden" to second-class constitutional status is without basis in this Court's (or any court's) decisions. Even assuming, for the sake of argument, that those considerations were Congress's sole basis for enacting Pub. L. 86-272, it has long been fundamental Commerce Clause law that acting to prevent such burdens on interstate commerce is within Congress's purview. *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116 (1942) (holding constitutional a federal statute regulating handling of agricultural products that "directly burdens, obstructs, or affects" interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (Congress's power under the Commerce Clause extends to regulation of local activities "which might have a substantial and harmful effect" on interstate commerce); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (Congress's principal concern in enacting the Anti-Head Tax Act was to prohibit the states from assessing fees "that unduly burden interstate commerce.").

In sum, well-established Commerce Clause and Tenth Amendment principles already set down by this Court and applied by others show beyond any serious argument that the previously-discussed state court decisions unanimously upholding the constitutionality of Pub. L. 86-272 are correct and consistent with those principles. There is no need for this Court further to address the issue here.

B. This case implicates none of the issues underlying the Court's recent Tenth Amendment or Commerce Clause decisions.

Nor is it necessary to grant certiorari to review Pub. L. 86-272 in light of this Court's recent decisions invalidating

federal statutes on Tenth Amendment or Commerce Clause grounds. Congress's enactment of Pub. L. 86-272 is plainly and substantially different from the congressional actions at issue in those cases.

First, this case is substantially and obviously different from cases in which a federal statute has been struck down because the statute's connection with interstate commerce was too attenuated. *See, e.g., United States v. Lopez,* 514 U.S. 549, 585 (1995) (striking down, as exceeding Congress's Commerce Clause power, a federal statute prohibiting the knowing possession of a gun in a school zone). In this case there is no question that the transactions protected under Pub. L. 86-272 are the very essence of interstate commerce. The statute protects transactions in which sales of goods are solicited in a particular state, the orders are sent outside that state for approval, and, if approved, the ordered goods are shipped or delivered from a point outside the state where the solicitation occurred. It is beyond argument that such multistate transactions involving the sale and transportation of goods are quintessentially interstate commerce. The Commissioner, in fact, openly admits that the transactions Massachusetts seeks to tax, and Pub. L. 86-272 seeks to protect, are interstate commerce. *See* Pet. 5 (describing the transactions covered by the challenged Massachusetts tax regulation, and noting that Pub. L. 86-272 "purports to limit the authority of the States to tax *such interstate commerce*") (emphasis added). There is no reason, therefore, for this Court to grant certiorari for the purpose of making a *Lopez*-like analysis of the activity affected by the federal statute.

Moreover, this case also fundamentally differs from recent cases in which the Court has struck down, on Tenth Amendment grounds, various federal statutes that, in effect, sought to press the states into the regulatory service of the federal government. *See, e.g., Printz v. United States,* —— U.S. ——, 65 U.S.L.W. 4731 (U.S. June 27,

1997) (invalidating a provision of the Brady Handgun Violence Prevention Act compelling local law enforcement officials to conduct background checks of gun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (striking down part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that forced states either to take title to radioactive waste generated within their borders, or regulate pursuant to Congress's direction). Those cases, too, are significantly different from the present case: unlike the federal statutes struck down in those cases, Pub. L. 86-272 merely limits the states' authority to tax certain transactions in interstate commerce. It plainly does not "'commandeer' state governments into the service of federal regulatory purposes," *New York*, 505 U.S. at 175, or "command . . . state governments to implement legislation enacted by Congress," id. at 176, or "press[] into federal service" local or state officials "in the administration of a federally enacted regulatory scheme," *Printz*, —— U.S. at ——, 65 U.S.L.W. at 4733. Moreover, courts addressing federal limits on state taxation already recognize this important distinction. *See Deer Park*, 132 F.3d at 1099 (distinguishing *New York* and *Printz*); *SEPTA*, 826 F. Supp. at 1519-1520 (distinguishing *New York*). Thus, the Court's recent Tenth Amendment cases provide no reason for the Court to grant certiorari in this case.

C. This Court already has strongly and expressly signaled its approval of Congress's enactment of Pub. L. 86-272.

Although this Court has never directly addressed the constitutionality of Pub. L. 86-272, it has had occasion to analyze and interpret the statute. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972). In doing so, the Court has never shown any doubt about the statute's constitutionality. In fact, in a recent and significant case involving state taxation of interstate commerce under the Due Process and Commerce Clauses, this Court endorsed Congress's enact-

ment of Pub. L. 86-272. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 315-16 and n.9. (1992).

In *Heublein*, the Court reviewed the origins of Pub. L. 86-272, noting that it arose from concern that the Court, in the earlier case of *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), had left unclear what local activities by an out-of-state company were enough to create sufficient nexus to allow the state to tax the company. *Heublein*, 409 U.S. at 280. The Court commented that Pub. L. 86-272 "was designed to define clearly a lower limit for the exercise of that power." *Id.*[7] In its discussion, the Court gave not the slightest indication that Congress's enactment of the statute was constitutionally suspect. See *id.* at 279-81. Twenty years later, in *Wrigley*, the Court revisited Pub. L. 86-272 in a case raising the issue of interpretation of the term "solicitation" in the statute. The Court again reviewed the circumstances of the statute's enactment, again noted that the statute was enacted for the purpose of defining a limit to the states' power to tax certain transactions, and again refused to suggest in any way that Congress could not constitutionally do what the Court recognized it had done. *See Wrigley*, 505 U.S. 220-223. That same year, in *Quill*, a case addressing the constitutional limits of nexus standards, the Court noted the benefits of clear, uniform rules pertaining to the boundaries of states' authority with respect to taxation of interstate commerce, and referred ap-

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[7] The Court's discussion of Pub. L. 86-272's origin makes clear the error in the Commissioner's assertions that the statute prohibits state taxation that "otherwise satisfies the Constitution," Pet. 8, and that is "based on a constitutional nexus between the taxpayer and the taxing State," Pet. 12. As the Court has recognized, Congress enacted Pub. L. 86-272 precisely because the required degree of nexus was *not* clear. *See Heublein*, 409 U.S. at 280 and n.5. Moreover, in a case decided just five years before enactment of Pub. L. 86-272, this Court had found insufficient nexus to permit state taxation even though some goods were delivered in the out-of-state company's own truck. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 341 (1954).

provingly to Congress's enactment of Pub. L. 86-272 as an example of such a rule. *See Quill,* 504 U.S. at 316 and n.9.[8] Thus, far from questioning the constitutional validity of Pub. L. 86-272, this Court has held out the statute as an example of the proper role of Congress in allocating tax burdens among interstate commerce, and, while not expressly so ruling, has strongly signaled that, under the test applied in *Snead,* Congress had a "rational basis" for finding that the state taxes proscribed under Pub. L. 86-272 interfered with interstate commerce, and that establishing the uniform standard in Pub. L. 86-272 was "a reasonable method to eliminate that interference." *See Snead,* 441 U.S. at 150.

D. Pub. L. 86-272 is a statute of long standing and only modest impact on the states. It does not unduly interfere with the states' ability to raise revenue, nor permit corporations to avoid paying tax.

Finally, the Commissioner greatly exaggerates the impact of Pub. L. 86-272 on the states, claiming that the statute "goes well beyond" other federal statutes restricting state taxation, Pet. 19, even raising the specter of the federal government unleashing "the right to destroy" the states' very power of taxation. Pet. 14. Hyperbole aside, however, the facts show that Pub. L. 86-272 is quite limited in its scope and impact, and no more intrusive than other federal statutes limiting state taxing authority.

Pub. L. 86-272 has been an integral part of the landscape of federal-state relations for nearly 40 years, since its enactment in 1959, providing a uniform threshold for state taxation of certain transactions in interstate commerce which "encourages settled expectations and, in

[8] The Court's comments in *Quill* also highlight the absurdity of the Commissioner's assertion, Pet. 16, n.3, that Pub. L. 86-272 "*undermines* the fairness and uniformity sought by the States in the application of their tax laws." (emphasis added). The statute plainly does just the opposite.

doing so, fosters investment by businesses and individuals." *See Quill Corp. v. North Dakota*, 504 U.S. 298, 316 & n.9. The Commissioner seeks to overturn longstanding and uniform law upon which all states and interstate companies have come to rely.

Moreover, contrary to the Commissioner's assertion, Pet. 19, that Pub. L. 86-272 "goes well beyond the other federal statutes that restrict state taxation," the actual scope of Pub. L. 86-272 is very limited. The statute affects only taxes on income, and even then, only income derived from the sale of tangible personal property, not services or intangible property.[9]

With respect to taxes that *are* implicated under Pub. L. 86-272, the statute only limits the authority of states to tax those out-of-state companies whose *only* connection with the taxing state are those enumerated in the statute.[10] An out-of-state company is not protected if it engages in activities in the taxing state beyond the very limited contacts that the statute permits. For example, an out-of-state company is not protected under Pub. L. 86-272 if its activities in the taxing state exceed the scope of solicitation, *Wrigley, supra*, or if it maintains a store of goods in the taxing state, *Heublein, supra*.

In proscribing only one specific type of tax applicable to only a limited category of transactions engaged in by a limited class of companies, Pub. L. 86-272 thus is con-

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[9] It in no way limits Massachusetts' authority to collect *other* taxes related to out-of-state companies' use of Massachusetts' highways or other facilities, such as taxes on the purchase or use of fuel, apportioned registration fees on commercial trucks, or tolls or other highway use taxes. Moreover, the statute does not limit Massachusetts' authority to collect sales and use taxes from persons who purchase or use goods in Massachusetts that are purchased from out-of-state companies covered by the statute.

[10] Or, as this Court has held, activities that are merely ancillary, or *de minimis* exceptions, to those permitted contacts, *see Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992).

ceptually no broader than, for example, the statute upheld in *Deer Park,* which exempts businesses located inside Foreign Trade Zones from state and local ad valorem property taxes. 19 U.S.C. § 81*o*(e). Moreover, this Court has recognized the "rather limited purposes" of Pub. L. 86-272, *see Heublein*, 280 U.S. at 279, and the court below in this case also noted the limited reach of the statute, describing it as a "permissibly small preclusion of State taxing power to protect interstate commerce." Pet. A-8.

In addition, companies whose income is protected under Pub. L. 86-272 from taxation by a particular state generally do not thereby escape state taxation of that income altogether. In other words, the practical effect of Pub. L. 86-272 in most instances is not to determine *whether* the income in question will be taxed, but simply *where*. That is because most states, including Massachusetts, have adopted a "throw back rule" originally drafted by the Multistate Tax Commission. Under this rule, if Pub. L. 86-272 protects a company from a particular state's income tax notwithstanding its sale of goods to a purchaser in that state, the revenues from those sales become taxable instead by the state of *origin* for the purpose of applying the origin state's corporate income tax. *See, e.g.,* Mass. G.L. c. 63 § 38(f). Thus, companies engaged in transactions covered by Pub. L. 86-272 ordinarily do not altogether escape state taxation of that income. Rather, the tax liability for those sales is merely "thrown back" from the destination state (which Pub. L. 86-272 prohibits from taxing the transaction) to the origin state, where the company's contacts will be great enough to subject it to taxation there. Public Law 86-272 does not "destroy" the states' power of taxation, it merely allocates the burden of state taxation of interstate commerce among the several states.

CONCLUSION

The unanimous state court decisions upholding the constitutionality of Pub. L. 86-272, this Court's existing Commerce Clause and Tenth Amendment jurisprudence, this Court's previous expression of approval of Congress' enactment of Pub. L. 86-272, and the limited scope and impact of Pub. L. 86-272, all plainly show that certiorari is not appropriate in this case.

To the extent that the Court may deem it necessary or desirable at some point to explore the outer boundary of Congress's authority under the Commerce Clause to limit state taxation, this case is not the right vehicle for that effort. Wherever that boundary may lie, it is plain that Pub. L. 86-272 does not even approach it, much less breach it.

NPTC respectfully requests, therefore, that the petition for a writ of certiorari be denied.

Respectfully submitted,

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